

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

APPLE INC.,)
Plaintiff,)
v.) C.A. No.

MASIMO CORPORATION and)
SOUND UNITED, LLC,)
Defendants.)

APPLE INC.)
Counter-Defendant.)

APPLE INC.,)
Plaintiff,)
v.) C.A. No.

MASIMO CORPORATION and SOUND UNITED,)
LLC,)
Defendants.)

MASIMO CORPORATION and)
CERCACOR LABORATORIES, INC.,)
Counter-Claimants,)
,

APPLE INC.)
Counter-Defendant.)

Wilmington, Delaware
Tuesday, June 20, 2023
Telephonic Ruling

BEFORE : HONORABLE JENNIFER L. HALL
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

Michele L. Rolfe, RPR, CRR

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APPEARANCES:

POTTER ANDERSON & CORROON LLP
BY: DAVID E. MOORE, ESQ.

-and-

DESMARAIS LLP
BY: JORDAN N. MALZ, ESQ.
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-and-

WILMER CUTLER PICKERING HALE AND DORR LLP
BY: JENNIFER MILICI, ESQ.
MARK A. FORD, ESQ.

For the Plaintiff

PHILLIPS MC LAUGHLIN & HALL, P.A.
BY: JOHN C. PHILLIPS, ESQ.

-and-

KNOBBE, MARTENS, OLSON & BEAR, LLP
BY: STEPHEN W. LARSON, ESQ.
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RYAN HORN, ESQ.

For the Defendants

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2 P R O C E E D I N G S

3 (REPORTER'S NOTE: The following teleconference was
4 held beginning at 12:00 p.m.)

5 THE COURT: Good afternoon, everyone. This is
6 Jennifer Hall. We're here on the call for a continuation of
7 the hearing we started last week on the pending motions to
8 dismiss and strike in 22-1377 and 22-1378.

9 Can I have appearances for Apple, please?

10 MR. MOORE: Good afternoon, Your Honor, David
11 Moore from Potter Anderson. I'm joined by a few of my
12 co-counsel from the Desmarais, Jordan Malz and Kerri-Ann
13 Limbeek. Also from the Wilmer team Jennifer Milici and Mark
14 Ford. As well as our attendees from the hearing, Megan
15 Thomas Kennedy and Natalie Poe from Apple.

16 THE COURT: Greet. Good afternoon to you all.

17 May I please have appearances for Masimo?

18 MR. PHILLIPS: Good afternoon, Your Honor. This
19 is Jack Phillips. With me on the line are Steve Laron, Ryan
20 Horn and Adam Powell of the Knobbe Martens firm.

21 THE COURT: Great. Good afternoon to all of
22 you.

23 Okay. I'm ready to give my report and
24 recommendation on the pending motions to dismiss and strike.

25 I'm going to recommend that all of the pending

1 motions be denied.

2 I'll summarize the reasons for that
3 recommendation in a moment. But, before I do, I want to be
4 clear that my failure to address a particular argument or
5 case cited by a party does not mean that I did not consider
6 it. We have carefully considered everything.

7 Plaintiffs Apple, Inc. sells Apple watches.
8 Defendant Masimo Corporation has launched a health watch
9 called the W1 watch.

10 Apple and Masimo each have patents relating to
11 aspects of their products. The cases in this court are not
12 the only cases between Apple and Masimo regarding their
13 watch products. At the Court's request, the parties saw the
14 chart filed at Docket No. 98 in the 1377 case, that lists
15 the proceedings between the parties, which includes a trade
16 secret case filed by Masimo in Federal Court in the Central
17 District of California and International Trade Commission
18 investigation initiated by Masimo, and an incredible number
19 of IPRs.

20 In the 1377 case before this court, Apple
21 alleges that Masimo and defendants, Sound United, infringed
22 certain of Apple's design patents, that's D883,279;
23 D947,842; D962,936; and D735,131.

24 In that case, defendants, Sound United, has
25 moved to dismiss the claims against it for failure to state

1 a claim. That's Docket No. 29.

18 Apple has moved to dismiss some of Masimo's
19 counterclaims, including the inequitable conduct
20 counterclaim and to strike Masimo's inequitable conduct
21 defense.

22 Because I'm speaking primarily for the parties
23 and the District Judge, rather than describe all of the
24 allegations across four voluminous pleadings at the outset,
25 I will recite only those allegations necessary to resolve

1 the disputes before me as I address them.

2 I'm not going to read into the record my
3 understanding of the legal standard that applies to a motion
4 to dismiss for failure to state a claim or how that standard
5 has been applied in the context of pleading infringement.

6 I set forth a recitation of the applicable legal
7 standards in my report and recommendation in *Boston Fog, LLC*
8 v. *Ryobi Technologies, Inc.*, No. 19-2310, 2020 WL 1532372,
9 from Mar. 21, 2020. And I incorporate that articulation by
10 preference.

11 To the extent that other legal standards apply,
12 I will discuss them where applicable. I'll start with Sound
13 United motions to dismiss the 1377 case.

14 Sound United moves to dismiss the infringement
15 claim against it for failure to state a claim.
16 Specifically, Sound United argues that the complaint fails
17 to allege facts plausibly suggesting that Sound United, as
18 opposed to Masimo, made, used, offered to sell, sold or
19 imported a W1 watch.

20 Apple responds that the complaint's allegations
21 raise a reasonable inference that Sound United committed an
22 infringement act.

23 In particular, the complaint alleges that in
24 2022, after Masimo had brought an ITC action to block
25 importation of the Apple watch, Masimo announced that it

1 would acquire Sound United for over \$1 billion "to
2 accelerate distributions of the combined companies expanding
3 portfolio of consumer healthcare products." And Masimo
4 stated that Sound United's "distribution channel... is
5 essential to what we're doing as an important product for
6 us, which is Masimo." And that's at paragraph 37 of the
7 complaint.

8 Masimo subsequently released a W1 watch a few
9 months later in August 2022. Taking those and the other
10 allegations as true, I agree that they plausibly suggest
11 that Sound United has sold, offered to sell or imported W1
12 watch.

13 Sound United also moved to dismiss the willful
14 infringement claim against it for failure to state a claim.
15 It argued that the complaint lacks sufficient factual
16 allegations to plausibly suggest that Sound United knew of
17 the asserted patents.

18 I disagree. Apple has plausibly alleged that
19 while Masimo was monitoring Apple's patents relating to the
20 Apple watch and instituting litigation to push the Apple
21 watch out of the market, Masimo was preparing to launch its
22 W1 that copied Apple's product and infringed Apple's
23 patents. In this context, Masimo acquired Sound United for
24 the publically-announced purpose of distributing the W1
25 watch. It can be plausibly inferred from those facts that

1 Sound United knew that Masimo's purpose in the acquisition
2 was to use Sound United to distribute the W1 watch, which
3 competes with the Apple watch and Sound United was aware of
4 Apple's design patents relating to the Apple batch.

5 Sound United's motion to dismiss in the 22-1377
6 case, that's Docket 29, should be denied.

7 Turning to the 1378 case. My recommendation and
8 rationale equally applies to Sound United's motion to
9 dismiss in the 1378 case.

10 That complaint refers to certain of Apple's
11 utility patents relating to aspects of wearable electronic
12 devices, and it makes nearly identical allegations regarding
13 Sound United. For the same reasons as in the 1377 case,
14 Apple's complaint in the 1378 case pleads sufficient facts
15 to raise a plausible inference that Sound United directly
16 infringed the asserted patents.

17 Sound United, again, argues that there is no
18 plausible allegation that it knew about the patents or
19 intended to cause infringement, and it contends that the
20 indirect infringement and willfulness claim should be
21 dismissed for those reasons. However, I agree, again, with
22 Apple that the complaint plausibly alleges that Sound United
23 had knowledge of Apple's patents and that the W1 watch is
24 accompanied by instructions that tell customers how to use
25 it in a manner that infringes.

1 So Sound United's motion to dismiss case
2 22-1378, Docket No. 13, should also be denied.

3 Whether Apple can actually prove that Sound
4 United committed an infringing act, that it knew about the
5 asserted patents and that it acted willfully, only time will
6 tell, but Apple has plausibly alleged both willful and
7 direct infringement, so the claims should go forward to
8 discovery.

16 Apple contends that Masimo's allegation should
17 be stricken because they failed to satisfy -- excuse me,
18 strike that. Apple contends that Masimo's inequitable
19 conduct allegation should be dismissed and its defense be
20 stricken because they failed to satisfy Federal Rule of
21 Civil Procedure 9(b) 's particularity standard. That rule
22 requires the pleadings to allege the specific who, what,
23 when, where and how of the alleged inequitable conduct.
24 Moreover, although knowledge and intent may be alleged
25 generally, the pleading must nonetheless contain sufficient

1 allegations of facts from which the Court may reasonably
2 infer that a specific individual, one, knew of the withheld
3 material information or the falsity of the material
4 misrepresentations; and, two, withheld or misrepresented
5 this information with a specific intent to deceive the PTO.

6 Apple contends that Masimo's allegations failed
7 to plead a specific "who," and that that individual knew of
8 the withheld or misrepresented information.

9 I disagree. With respect to the "who," it is
10 true that many of Masimo's allegations are formulated
11 conjunctively, for example, Mr. Myers, the Named Design
12 Inventors, and others at Apple involved in the prosecution
13 of the sensor design patents, and Apple, through Mr. Myers
14 and others involved in the prosecution of the sensor design
15 patent.

16 However, I agree with Masimo that the fact that
17 Masimo gratuitously alleges that others at Apple may have
18 also been involved does not change the fact that Masimo
19 identified specific individuals. Masimo's pleading also
20 linked the specific individuals to specific conduct making
21 clear who is alleged to have done what. For example, it
22 alleges that the Named Design Inventors knew through their
23 involvement in the development process that the claimed
24 design are functional and non-ornamental and had been
25 developed by the inventors listed on the utility patents,

1 but intentionally failed to disclose that information to the
2 PTO.

3 It also alleges, for example, that Mr. Myers
4 selected different law firms to prosecute the design and the
5 utility patents for the purpose of ensuring that the law
6 firms wouldn't know about and disclose information about the
7 other application to the PTO examiner.

8 Apple contends that Masimo's pleading fails to
9 sufficiently allege that Mr. Myers owed a duty of disclosure
10 to the PTO. As relevant here, the duty of disclosure
11 applies to every person who is substantially involved in the
12 preparation or prosecution of the application and who is
13 associated with the inventor or the applicant.

14 The Federal Circuit has interpreted
15 "substantively involved" to mean the involvement relates to
16 the context of the application or decisions related thereto
17 and that the involvement is not wholly administrative or
18 secretarial in nature.

19 I agree with Masimo that it has alleged enough
20 here to get past a motion to dismiss. It alleges that he
21 was involved in the selection of different law firms to
22 prosecute the patents' compartmentalized information so that
23 persons involved in the prosecution of the design patents
24 would not know that the claimed designs were actually
25 functional and non-ornamental, and would not disclose

1 material information adverse to Apple's position.

2 Masimo also points out that he is listed, along
3 with many others, under Apple's PTO customer number as a
4 practitioner with power of attorney for Apple.

5 Apple essentially argues that even taken as
6 true, Masimo's allegations do not amounted to substantive
7 involvement. But the Federal Circuit has explained that, in
8 conducting the substantive involvement inquiry, the
9 "District Court may properly consider a variety of factors,
10 such as an individual's position within the company, role in
11 developing or marketing the patented idea, contacts with the
12 inventors or prosecutors and representations to the PTO."

13 Masimo's allegations taken as true suggest that
14 a particular named individual managed the patent prosecution
15 process, selected Apple's patent prosecution attorneys and
16 agents, and essentially controls what information would be
17 disclosed to whom. I can't say that such facts if proven
18 could never amount to inequitable conduct.

19 Apple also challenges the inequitable conduct
20 claims on the basis that it's not plausible that any of the
21 identified individuals had an intent to deceive. However,
22 defendants are not required at the pleading stage to prove
23 or even plead that a specific deceptive intent is a single
24 most reasonable inference to be drawn from the facts
25 alleged. The Court only needs to assess whether the facts

1 as pleaded give rise to a reasonable inference of intent to
2 deceive, and the allegations already described are
3 sufficient to meet that standard.

4 I also agree with Masimo that its allegation of
5 materiality with respect to the failure to disclose the
6 utility applications during the prosecution of the design
7 patents is sufficient to survive a motion to dismiss. Among
8 other things, Masimo points out that patent examiners are
9 permitted to cite the specification of an analogous utility
10 patent evidencing the claimed design as evidence supporting
11 rejection of a design patent. And that the specifications
12 of the allegedly withheld utility patents appear to describe
13 functions to certain features of the claimed design.

14 Whether Masimo will ultimately be able to prove
15 that the claimed designs are functional is a question for a
16 later day.

17 Masimo also alleges inequitable conduct in
18 connection with prosecution of some of the asserted utility
19 patents. The gist of this allegation is that individuals at
20 Apple involved in the prosecution, including Mr. Myers,
21 failed to disclose certain prior art references material to
22 patentability. Here, again, Apple contends that Mr. Myers
23 was not substantively involved in prosecution, however, as
24 before, I decline to make that determination at this stage
25 of the case.

20 Next in the 1378 case, Apple seeks to dismiss
21 Masimo's counterclaims for monopolization and attempted
22 monopolization under Section II of the Sherman Act. I set
23 forth my understanding of the applicable legal standards in
24 my report and recommendation in *3 Shape Trios v. Align*
25 *Technology, Inc.*, that's 2020 WL 2559777, from May 20, 2020,

1 and I incorporate that articulation by reference.

2 Masimo alleges that the following conduct on the
3 part of Apple qualifies as anticompetitive conduct: One,
4 enforcing a fraudulently obtained patent, i.e., Walker
5 Process fraud; two, leveraging its monopoly in iOS apps
6 distribution market to harm competition in the health watch
7 market; three, false advertising; and, four, predatory
8 infringement.

9 Apple argues that Masimo lacks antitrust
10 standing because it hasn't alleged an antitrust injury or a
11 harm to competition. I disagree.

12 Masimo alleges, among other things, that Apple
13 is seeking to enjoin Masimo from selling its W1 watch by
14 enforcing a patent obtained through fraud i.e., a Walker
15 Process claim.

16 Masimo further alleges that if Apple were to
17 succeed in excluding Masimo from the health watch market,
18 "Apple would become further entrenched as a monopolist and
19 further free to set prices far above the level that would
20 occur in the presence of true competition, set a low
21 standard for health watch performance, and continue to sell
22 inferior products."

23 The *TransWeb* case cited by Masimo explains that
24 with respect to Walker Process claims, it is the abuse of
25 the legal process by the antitrust defendant that makes the

1 attorneys fees incurred by the antitrust plaintiff during
2 that legal process a relevant antitrust injury. To the
3 extent Apple contends that TransWeb only authorized
4 attorneys' fees as antitrust damages, not antitrust injury,
5 that is incorrect. The case holds that attorneys' fees can
6 constitute antitrust injury even if the infringement lawsuit
7 failed to keep the defendant's product off the market.

8 I agree with Judge Goldberg in *Azurity Pharm v.*
9 *Bionpharma*, 2023 WL 157732, from Jan. 11, 2023, in which he
10 reasons that TransWeb squarely rejected the argument Apple
11 makes here and tells that attorneys' fees can be an
12 antitrust injury in these circumstances.

13 Apple next contends that Masimo has failed to
14 plausibly allege a relevant market. Masimo's pleading
15 identifies a "health watch" market, which it defined as the
16 market for consumer-worn wristwatches that measure
17 physiological parameters. Masimo makes additional
18 allegations explaining why other devices don't -- other
19 devices fall or don't fall within the market, as defined by
20 Masimo.

21 In general, the determination of a relevant
22 market is complex and fact-intensive inquiry which is
23 generally inappropriate on a motion to dismiss. I cannot
24 say that the relevant market alleged by Masimo is
25 implausible, so I recommend denying Apple's request to

1 dismiss on that basis.

2 Apple next argues that Masimo fails to plausibly
3 allege that Apple either has or will have a dangerous
4 probability of obtaining monopoly power in the "health
5 watch" market alleged by Masimo. Masimo alleges upon
6 information and belief that Apple's market share of the U.S.
7 "health watch" market exceeds 70 percent. Masimo's pleading
8 explains that this estimate is based on: One, analyst
9 estimates that Apple share of U.S. smart watch sales exceeds
10 90 percent; two, analyst estimates that Apple share of the
11 global smart watch market is about 50 percent; three, brands
12 such as Huawei and Samsung are more popular overseas, so one
13 would expect Apple's share of the U.S. smart watch market to
14 be greater than its share of the global smart watch market;
15 and, four, Apple's share of the health watch market would be
16 greater than or equal to its share of the smart watch market
17 because the "health watch" market excludes smart watches
18 that lacks physiological measurement features.

19 I can't say that Masimo's inferences are
20 unreasonable, and I agree with Masimo that those allegations
21 taken together raise a plausible inference that Apple's
22 market share meets or exceeds 70 percent. That is
23 sufficient at this stage to allege monopoly power.

24 Apple next contends that Masimo has failed to
25 plausibly alleged anticompetitive conduct. As mentioned,

1 Apple has engaged in four types of anticompetitive conduct,
2 including Walker Process fraud.

3 Apple's argument that the Walker Process theory
4 is sufficient is bound up with its argument that Masimo's
5 inequitable conduct allegations are deficient. As I have
6 already determined that Masimo states a claim of inequitable
7 conduct, I reject Apple's argument that Masimo's allegation
8 of Walker Process fraud is deficient.

9 Apple points out that it is also asserting other
10 patents that aren't alleged to have been obtained by fraud;
11 however, Masimo contends that those patents are invalid or
12 not infringed. If Apple is entitled to exclude Masimo from
13 the market by enforcing other patents not accused of fraud,
14 that may very well affect Masimo's antitrust claims, but
15 that can't be decided at this stage.

16 Masimo's second theory of anticompetitive
17 conduct is that Apple is leveraging its monopoly power in
18 the iOS app distribution market to harm Masimo and
19 competition as a whole in the separate "health watch"
20 market. I have some questions about the viability of this
21 theory, especially since everyone seemed to agree at the
22 hearing that Masimo's watch app is available on Apple's app
23 store. Masimo's third anticompetitive conduct theory is
24 that Apple committed exclusionary conduct through allegedly
25 false advertising; and its forth theory has to do with

1 so-called predatory patent infringement. I also have real
2 questions about those two theories.

3 However, as I have already concluded that Masimo
4 adequately states a claim under a Walker Process theory, I
5 recommend that Apple's motion to dismiss Masimo's Sherman
6 Act Section II claims be denied.

7 As I mentioned at the hearing, to the extent
8 that Masimo seeks discovery that is not proportional to a
9 viable theory of anticompetitive conduct, the Court will
10 deal with it at that time.

11 Apple also seeks dismissal of Masimo's
12 counterclaim for false advertising under the Lanham Act. I
13 recommend denying the motion to dismiss.

14 Although Apple argues that none of the
15 statements are literally false, Masimo has pleaded several
16 potentially false representations along with underlying
17 facts that, taken as true, raise a reasonable inference that
18 the representations were false. As the proximate cause
19 Masimo need only allege facts raising a reasonable inference
20 that it is likely to be damaged as a result of the false
21 advertising. Masimo alleges that the W1 and Apple watch are
22 considered economic substitutes, that the Apple watch is an
23 inferior product with respect to physiological parameter
24 measurement, but that as a result of Apple's allegedly false
25 and misleading advertising consumers erroneously choose the

1 Apple watch over the W1. That is enough at this stage.

2 Apple treats the Delaware state law false
3 advertising and California UCL claims as rising or falling
4 with its Lanham Act and Sherman Act claims. So I recommend
5 that the state law claims be permitted to go forward as
6 well.

7 And, finally, Apple argues that Masimo's willful
8 and indirect infringement counterclaims should be dismissed
9 because Masimo failed to allege that Apple had pre-suit
10 knowledge of the patents.

11 Here's what I will say about that. Whatever
12 merits that argument might have in its different case with
13 different parties, it is not well taken at this stage in
14 this case with these parties. The parties on pleadings
15 discuss the parties' history with each other. You can look
16 at the face of these patents and see that they assigned to
17 Masimo and that most relate to user-worn devices for
18 measuring physiological data.

19 It's implausible to me that either of these
20 particular parties has a patent on such devices that the
21 other side didn't know about before this suit was filed.
22 And that concludes by report and recommendation.

23 We'll put it up on the docket indicating that
24 all of the pending motions to dismiss should be denied and
25 will refer to the Court's report and recommendation that was

1 issued from the bench.

2 The time to object, if any party chooses to,
3 will run from today when we put the order up, but I would
4 caution the parties to carefully think about whether the
5 Court's resources are best spent dealing with objections on
6 these particular motions.

7 All right. Thanks everyone. Take care.

8 (Whereupon, the following proceeding concluded
9 at 12:32 p.m.)

10 I hereby certify the foregoing is a true
11 and accurate transcript from my stenographic notes in the
12 proceeding.

13 /s/ Michele L. Rolfe, RPR, CRR
14 U.S. District Court

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| 1 [1] - 7:1 10,076,257 [1] - 5:9 10,627,783 [1] - 5:9 10,942,491 [1] - 5:9 10,987,054 [1] - 5:9 11 [1] - 17:9 11,106,352 [1] - 5:10 11,474,483 [1] - 5:10 12:00 [1] - 3:4 12:32 [1] - 22:9 13 [2] - 5:12, 9:2 1377 [5] - 4:14, 4:20, 6:13, 8:13, 9:23 1378 [6] - 5:7, 8:7, 8:9, 8:14, 9:20, 15:20 1532372 [1] - 6:8 157732 [1] - 17:9 19-2310 [1] - 6:8 | able [1] - 14:14 abuse [1] - 16:24 accelerate [1] - 7:2 accompanied [1] - 8:24 accurate [1] - 22:11 accused [1] - 19:13 acquire [1] - 7:1 acquired [1] - 7:23 acquisition [1] - 8:1 act [2] - 6:22, 9:4 Act [5] - 15:22, 20:6, 20:12, 21:4 acted [1] - 9:5 action [1] - 6:24 actual [1] - 10:14 ADAM [1] - 2:15 Adam [1] - 3:20 additional [1] - 17:17 address [2] - 4:4, 6:1 adequately [1] - 20:4 administrative [1] - 12:17 adverse [1] - 13:1 advertising [7] - 5:15, 16:7, 19:25, 20:12, 20:21, 20:25, 21:3 affect [1] - 19:14 afternoon [5] - 3:5, 3:10, 3:16, 3:18, 3:21 agents [1] - 13:16 agree [8] - 7:10, 8:21, 11:16, 12:19, 14:4, 17:8, 18:20, 19:21 Align [1] - 15:24 allegation [7] - 8:18, 10:16, 10:19, 14:4, 14:19, 15:7, 19:7 allegations [16] - 5:24, 5:25, 6:20, 7:10, 7:16, 8:12, 9:14, 11:1, 11:6, 11:10, 13:6, 13:13, 14:2, 17:18, 18:20, 19:5 allege [9] - 6:17, 10:22, 12:9, 15:2, 17:14, 18:3, 18:23, 20:19, 21:9 alleged [12] - 7:18, 9:6, 10:23, 10:24, 11:21, 12:19, 13:25, 16:10, 17:24, 18:5, 18:25, 19:10 allegedly [4] - 14:12, 15:2, 19:24, 20:24 | alleges [19] - 4:21, 5:7, 6:23, 8:22, 9:17, 10:1, 10:8, 10:13, 11:17, 11:22, 12:3, 12:20, 14:17, 15:4, 16:2, 16:12, 16:16, 18:5, 20:21 amount [1] - 13:18 amounted [1] - 13:6 analogous [1] - 14:9 analyst [2] - 18:8, 18:10 AND [2] - 1:2, 2:8 Anderson [1] - 3:11 ANDERSON [1] - 2:3 Ann [1] - 3:12 ANN [1] - 2:6 announced [2] - 6:25, 7:24 answered [2] - 5:2, 5:13 anticompetitive [6] - 16:3, 18:25, 19:1, 19:16, 19:23, 20:9 antitrust [11] - 5:15, 16:9, 16:10, 16:25, 17:1, 17:2, 17:4, 17:6, 17:12, 19:14 app [3] - 19:18, 19:22 appear [1] - 14:12 APPEARANCES [1] - 2:1 appearances [2] - 3:9, 3:17 apple [1] - 12:8 APPLE [4] - 1:4, 1:10, 1:12, 1:18 Apple [67] - 3:9, 3:15, 4:7, 4:10, 4:12, 4:20, 5:3, 5:7, 5:18, 6:20, 6:25, 7:18, 7:20, 8:3, 8:4, 8:22, 9:3, 9:6, 9:10, 9:14, 9:15, 9:20, 9:23, 10:2, 10:16, 10:18, 11:6, 11:12, 11:13, 11:17, 13:4, 13:5, 13:19, 14:20, 14:22, 15:1, 15:5, 15:20, 16:3, 16:9, 16:12, 16:16, 16:18, 17:3, 17:10, 17:13, 18:2, 18:3, 18:9, 18:10, 18:24, 19:1, 19:9, 19:12, 19:17, 19:24, 20:11, 20:14, 20:21, 20:22, 21:1, 21:2, 21:7, 21:9 Apple's [25] - 4:22, 5:8, 7:19, 7:22, 8:4, | 8:10, 8:14, 8:23, 9:9, 9:19, 13:1, 13:3, 13:15, 15:10, 17:25, 18:6, 18:13, 18:15, 18:21, 19:3, 19:7, 19:22, 20:5, 20:24 applicable [3] - 6:6, 6:12, 15:23 applicant [1] - 12:13 application [3] - 12:7, 12:12, 12:16 applications [2] - 9:20, 14:6 applied [1] - 6:5 applies [3] - 6:3, 8:8, 12:11 apply [1] - 6:11 apps [1] - 16:5 argued [1] - 7:15 argues [7] - 6:16, 8:17, 13:5, 16:9, 18:2, 20:14, 21:7 argument [6] - 4:4, 17:10, 19:3, 19:4, 19:7, 21:12 art [3] - 14:21, 15:3, 15:5 articulation [2] - 6:9, 16:1 aspects [2] - 4:11, 8:11 asserted [10] - 5:2, 5:13, 7:17, 8:16, 9:5, 9:20, 9:22, 10:9, 14:18, 15:5 asserting [1] - 19:9 assess [1] - 13:25 assigned [1] - 21:16 associated [1] - 12:13 attempt [1] - 9:24 attempted [1] - 15:21 attendees [1] - 3:14 attorney [1] - 13:4 attorneys [2] - 13:15, 17:1 attorneys' [3] - 17:4, 17:5, 17:11 August [1] - 7:9 authorized [1] - 17:3 available [1] - 19:22 aware [1] - 8:3 Azurity [1] - 17:8 |
| 2 | | | C |
| 20 [2] - 1:21, 15:25 2020 [4] - 6:8, 6:9, 15:25 2022 [2] - 6:24, 7:9 2023 [3] - 1:21, 17:9 21 [1] - 6:9 22-1377 [2] - 3:8, 8:5 22-1377-MN-JLH [2] - 1:5, 1:9 22-1378 [2] - 3:8, 9:2 22-1378-MN-JLH [1] - 1:13 2559777 [1] - 15:25 29 [2] - 5:1, 8:6 | | | C.A [3] - 1:5, 1:9, 1:13 California [2] - 4:17, 21:3 cannot [1] - 17:23 care [1] - 22:7 carefully [2] - 4:6, 22:4 carry [1] - 10:4 case [21] - 4:5, 4:14, 4:16, 4:20, 4:24, 5:7, 6:13, 8:6, 8:7, 8:9, 8:13, 8:14, 9:1, 9:20, 9:23, 14:25, 15:20, 16:23, 17:5, 21:12, 21:14 cases [4] - 4:11, 4:12, 9:9, 15:12 caution [1] - 22:4 Central [1] - 4:16 CERCACOR [1] - 1:16 certain [5] - 4:22, 5:8, 8:10, 14:13, 14:21 certainly [1] - 15:16 certify [1] - 22:10 challenges [1] - 13:19 change [1] - 11:18 channel.. [1] - 7:4 chart [1] - 4:14 Chief [1] - 10:2 choose [1] - 20:25 chooses [1] - 22:2 Circuit [2] - 12:14, 13:7 circumstances [1] - 17:12 cite [1] - 14:9 cited [2] - 4:5, 16:23 Civil [1] - 10:21 claim [12] - 5:1, 5:5, |
| 3 | | | |
| 3 [1] - 15:24 37 [1] - 7:6 | | | |
| 5 | | | |
| 50 [1] - 18:11 54 [1] - 5:6 | | | |
| 7 | | | B |
| 70 [2] - 18:7, 18:22 | | | |
| 9 | | | |
| 9(b)'s [1] - 10:21 90 [1] - 18:10 | | | based [1] - 18:8 basis [3] - 13:20, 15:6, 18:1 batch [1] - 8:4 BEAR [1] - 2:14 |

| | | | | |
|---|--|---|---|---|
| <p>5:12, 6:4, 6:15, 7:14, 8:20, 16:15, 19:6, 20:4</p> <p>Claimant [1] - 1:9</p> <p>Claimants [1] - 1:17</p> <p>claimed [5] - 11:23, 12:24, 14:10, 14:13, 14:15</p> <p>claims [12] - 4:25, 5:11, 9:7, 13:20, 15:15, 15:16, 16:24, 19:14, 20:6, 21:3, 21:4, 21:5</p> <p>clear [3] - 4:4, 11:21, 15:13</p> <p>co [1] - 3:12</p> <p>co-counsel [1] - 3:12</p> <p>combined [1] - 7:2</p> <p>Commission [1] - 4:17</p> <p>committed [3] - 6:21, 9:4, 19:24</p> <p>companies [1] - 7:2</p> <p>company [1] - 13:10</p> <p>compartmentalized [1] - 12:22</p> <p>compartmentalizing [1] - 10:5</p> <p>competes [1] - 8:3</p> <p>competition [5] - 5:15, 16:6, 16:11, 16:20, 19:19</p> <p>complaint [9] - 5:2, 5:13, 6:16, 6:23, 7:7, 7:15, 8:10, 8:14, 8:22</p> <p>complaint's [1] - 6:20</p> <p>complex [1] - 17:22</p> <p>conceal [1] - 9:24</p> <p>concealed [1] - 9:15</p> <p>concluded [2] - 20:3, 22:8</p> <p>concludes [1] - 21:22</p> <p>conduct [27] - 5:3, 5:4, 5:6, 5:17, 5:19, 5:20, 9:10, 9:11, 9:14, 10:19, 10:23, 11:20, 13:18, 13:19, 14:17, 15:7, 15:11, 16:2, 16:3, 18:25, 19:1, 19:5, 19:7, 19:17, 19:23, 19:24, 20:9</p> <p>conducting [1] - 13:8</p> <p>configurations [1] - 9:18</p> <p>conjunctively [1] - 11:11</p> <p>connection [1] - 14:18</p> <p>consider [2] - 4:5,</p> | <p>13:9</p> <p>considered [2] - 4:6, 20:22</p> <p>constitute [1] - 17:6</p> <p>consumer [2] - 7:3, 17:16</p> <p>consumer-worn [1] - 17:16</p> <p>consumers [1] - 20:25</p> <p>contacts [1] - 13:11</p> <p>contain [1] - 10:25</p> <p>contends [11] - 8:19, 10:16, 10:18, 11:6, 12:8, 14:22, 15:1, 17:3, 17:13, 18:24, 19:11</p> <p>context [3] - 6:5, 7:23, 12:16</p> <p>continuation [1] - 3:6</p> <p>continue [1] - 16:21</p> <p>controls [1] - 13:16</p> <p>coordinated [1] - 10:4</p> <p>copied [1] - 7:22</p> <p>CORPORATION [4] - 1:6, 1:8, 1:14, 1:16</p> <p>Corporation [1] - 4:8</p> <p>CORROON [1] - 2:3</p> <p>counsel [2] - 3:12, 10:2</p> <p>Counter [4] - 1:9, 1:11, 1:17, 1:18</p> <p>Counter-Claimant [1] - 1:9</p> <p>Counter-Claimants [1] - 1:17</p> <p>Counter-Defendant [2] - 1:11, 1:18</p> <p>counterclaim [4] - 5:3, 5:5, 5:20, 20:12</p> <p>counterclaims [7] - 5:14, 5:19, 9:11, 15:11, 15:21, 21:8</p> <p>COURT [5] - 1:1, 1:24, 3:5, 3:16, 3:21</p> <p>court [2] - 4:11, 4:20</p> <p>Court [6] - 4:16, 11:1, 13:9, 13:25, 20:9, 22:13</p> <p>Court's [3] - 4:13, 21:25, 22:5</p> <p>covered [1] - 10:10</p> <p>CRR [2] - 1:25, 22:13</p> <p>customer [1] - 13:3</p> <p>customers [1] - 8:24</p> <p>CUTLER [1] - 2:8</p> | <p>D883,279 [1] - 4:22</p> <p>D947,842 [1] - 4:23</p> <p>D962,936 [1] - 4:23</p> <p>damaged [1] - 20:20</p> <p>damages [1] - 17:4</p> <p>dangerous [1] - 18:3</p> <p>data [1] - 21:18</p> <p>DAVID [1] - 2:3</p> <p>David [1] - 3:10</p> <p>deal [1] - 20:10</p> <p>dealing [1] - 22:5</p> <p>deceive [5] - 11:5, 13:21, 14:2, 15:3, 15:9</p> <p>deceptive [1] - 13:23</p> <p>decided [1] - 19:15</p> <p>decisions [1] - 12:16</p> <p>decline [1] - 14:24</p> <p>Defendant [3] - 1:11, 1:18, 5:4</p> <p>defendant [3] - 4:8, 5:10, 16:25</p> <p>defendant's [1] - 17:7</p> <p>defendants [3] - 4:21, 4:24, 13:22</p> <p>Defendants [3] - 1:7, 1:15, 2:17</p> <p>defense [4] - 5:3, 5:6, 5:21, 10:19</p> <p>defenses [2] - 9:12, 15:12</p> <p>deficient [2] - 19:5, 19:8</p> <p>defined [2] - 17:15, 17:19</p> <p>DELAWARE [1] - 1:2</p> <p>Delaware [2] - 1:20, 21:2</p> <p>denied [6] - 4:1, 8:6, 9:2, 15:12, 20:6, 21:24</p> <p>denying [2] - 17:25, 20:13</p> <p>describe [2] - 5:23, 14:12</p> <p>described [1] - 14:2</p> <p>design [18] - 4:22, 8:4, 9:16, 9:22, 10:7, 10:9, 10:10, 10:11, 10:15, 11:13, 11:14, 11:24, 12:4, 12:23, 14:6, 14:10, 14:11, 14:13</p> <p>Design [2] - 11:11, 11:22</p> <p>designs [3] - 9:22, 12:24, 14:15</p> <p>Desmarais [1] - 3:12</p> <p>DESMARAIS [1] - 2:5</p> <p>determination [2] -</p> | <p>E</p> <p>economic [1] - 20:22</p> <p>either [2] - 18:3, 21:19</p> <p>electronic [1] - 8:11</p> <p>enforcing [3] - 16:4, 16:14, 19:13</p> <p>engaged [1] - 19:1</p> <p>enjoin [1] - 16:13</p> <p>ensuring [1] - 12:5</p> <p>entitled [1] - 19:12</p> <p>entrenched [1] - 16:18</p> <p>equal [1] - 18:16</p> <p>equally [1] - 8:8</p> <p>erroneously [1] - 20:25</p> <p>especially [1] - 19:21</p> <p>ESQ [9] - 2:3, 2:6, 2:6, 2:9, 2:9, 2:12, 2:15, 2:15, 2:16</p> <p>essential [1] - 7:5</p> <p>essentially [2] - 13:5, 13:16</p> <p>estimate [1] - 18:8</p> <p>estimates [2] - 18:9, 18:10</p> <p>evidence [1] - 14:10</p> <p>evidencing [1] - 14:10</p> <p>examiner [2] - 10:10, 12:7</p> <p>examiners [4] - 9:15, 9:25, 10:6, 14:8</p> <p>example [3] - 11:11, 11:21, 12:3</p> <p>exceeds [3] - 18:7, 18:9, 18:22</p> <p>exclude [1] - 19:12</p> <p>excludes [1] - 18:17</p> <p>excluding [1] - 16:17</p> <p>exclusionary [1] - 19:24</p> <p>excuse [1] - 10:17</p> <p>expanding [1] - 7:2</p> <p>expect [1] - 18:13</p> <p>explained [1] - 13:7</p> <p>explaining [1] - 17:18</p> <p>explains [2] - 16:23, 18:8</p> <p>extent [3] - 6:11, 17:3, 20:7</p> | <p>F</p> <p>face [1] - 21:16</p> <p>fact [4] - 9:24, 11:16, 11:18, 17:22</p> <p>fact-intensive [1] - 17:22</p> <p>factors [1] - 13:9</p> <p>facts [9] - 6:17, 7:25,</p> |
| | <p>D</p> <p>D.I [1] - 5:6</p> <p>D735,131 [1] - 4:23</p> | | | |

| | | | |
|---|---|--|--|
| <p>8:14, 11:1, 13:17, 13:24, 13:25, 20:17, 20:19 factual [1] - 7:15 failed [9] - 10:17, 10:20, 11:6, 12:1, 14:21, 17:7, 17:13, 18:24, 21:9 fails [4] - 6:16, 12:8, 15:1, 18:2 failure [8] - 4:4, 4:25, 5:5, 5:12, 6:4, 6:15, 7:14, 14:5 fall [2] - 17:19 falling [1] - 21:3 false [10] - 5:15, 16:7, 19:25, 20:12, 20:15, 20:16, 20:18, 20:20, 20:24, 21:2 falsity [1] - 11:3 far [1] - 16:19 features [4] - 9:17, 10:11, 14:13, 18:18 Federal [4] - 4:16, 10:20, 12:14, 13:7 fees [4] - 17:1, 17:4, 17:5, 17:11 few [2] - 3:11, 7:8 filed [3] - 4:14, 4:16, 21:21 finally [1] - 21:7 firm [1] - 3:20 firms [4] - 10:6, 12:4, 12:6, 12:21 first [2] - 15:17, 15:19 Fog [1] - 6:7 following [3] - 3:3, 16:2, 22:8 FOR [1] - 1:2 FORD [1] - 2:9 Ford [1] - 3:14 foregoing [1] - 22:10 formulated [1] - 11:10 forth [3] - 6:6, 15:23, 19:25 forward [3] - 9:7, 15:18, 21:5 four [4] - 5:24, 16:7, 18:15, 19:1 fraud [6] - 16:5, 16:14, 19:2, 19:8, 19:10, 19:13 fraudulently [1] - 16:4 free [1] - 16:19 functional [5] - 9:21, 10:11, 11:24, 12:25, 14:15 functions [1] - 14:13</p> | <p>G</p> <p>general [1] - 17:21 generally [2] - 10:25, 17:23 gist [2] - 9:13, 14:19 global [2] - 18:11, 18:14 Goldberg [1] - 17:8 gratuitously [1] - 11:17 Great [1] - 3:21 greater [2] - 18:14, 18:16 greet [1] - 3:16</p> <p>H</p> <p>HALE [1] - 2:8 HALL [2] - 1:24, 2:12 Hall [1] - 3:6 harm [3] - 16:6, 16:11, 19:18 Hauwei [1] - 18:12 health [10] - 4:8, 16:6, 16:17, 16:21, 17:15, 18:4, 18:7, 18:15, 18:17, 19:19 healthcare [1] - 7:3 hearing [4] - 3:7, 3:14, 19:22, 20:7 held [1] - 3:4 hereby [1] - 22:10 hiring [1] - 10:6 history [1] - 21:15 holds [1] - 17:5 Honor [2] - 3:10, 3:18 HONORABLE [1] - 1:24 Horn [1] - 3:20 HORN [1] - 2:16</p> <p>I</p> <p>i.e [2] - 16:4, 16:14 idea [1] - 13:11 identical [2] - 8:12, 9:21 identified [2] - 11:19, 13:21 identifies [1] - 17:15 II [2] - 15:22, 20:6 implausible [2] - 17:25, 21:19 important [1] - 7:5 importation [1] - 6:25 imported [2] - 6:19, 7:11 IN [2] - 1:1, 1:2 inappropriate [1] -</p> | <p>17:23 Inc [3] - 4:7, 6:8, 15:25 INC [5] - 1:4, 1:10, 1:12, 1:16, 1:18 includes [1] - 4:15 including [6] - 5:14, 5:19, 9:19, 10:2, 14:20, 19:2 incorporate [2] - 6:9, 16:1 incorrect [1] - 17:5 incredible [1] - 4:18 incurred [1] - 17:1 indicating [1] - 21:23 indirect [2] - 8:20, 21:8 individual [4] - 10:3, 11:2, 11:7, 13:14 individual's [1] - 13:10 individuals [6] - 9:14, 10:2, 11:19, 11:20, 13:21, 14:19 inequitable [18] - 5:3, 5:4, 5:6, 5:17, 5:19, 5:20, 9:10, 9:11, 9:13, 10:18, 10:23, 13:18, 13:19, 14:17, 15:6, 15:11, 19:5, 19:6 infer [1] - 11:2 inference [8] - 6:21, 8:15, 13:24, 14:1, 15:8, 18:21, 20:17, 20:19 inferences [1] - 18:19 inferior [2] - 16:22, 20:23 inferred [1] - 7:25 information [11] - 10:5, 10:8, 11:3, 11:5, 11:8, 12:1, 12:6, 12:22, 13:1, 13:16, 18:6 infringed [5] - 4:21, 5:8, 7:22, 8:16, 19:12 infringement [12] - 5:16, 6:5, 6:14, 6:22, 7:14, 8:19, 8:20, 9:7, 16:8, 17:6, 20:1, 21:8 infringes [1] - 8:25 infringing [1] - 9:4 initiated [1] - 4:18 injury [5] - 16:10, 17:2, 17:4, 17:6, 17:12 inquiry [2] - 13:8, 17:22</p> | <p>instituting [1] - 7:20 instructions [1] - 8:24 intended [1] - 8:19 intensive [1] - 17:22 intent [7] - 10:24, 11:5, 13:21, 13:23, 14:1, 15:3, 15:9 intentionally [1] - 12:1 International [1] - 4:17 interpreted [1] - 12:14 invalid [1] - 19:11 inventor [1] - 12:13 Inventors [2] - 11:12, 11:22 inventors [5] - 9:23, 10:3, 10:14, 11:25, 13:12 investigation [1] - 4:18 involved [10] - 11:12, 11:14, 11:18, 12:11, 12:15, 12:21, 12:23, 13:23, 13:25 involvement [5] - 11:23, 12:15, 12:17, 13:7, 13:8 iOS [2] - 16:5, 19:18 IP [1] - 10:2 IPR [1] - 15:4 IPRs [1] - 4:19 issued [2] - 10:12, 22:1 ITC [1] - 6:24</p> <p>J</p> <p>Jack [1] - 3:19 Jan [1] - 17:9 Jeffrey [1] - 10:3 Jennifer [2] - 3:6, 3:13 JENNIFER [2] - 1:24, 2:9 JOHN [1] - 2:12 joined [1] - 3:11 JORDAN [1] - 2:6 Jordan [1] - 3:12 Judge [2] - 5:23, 17:8 JUDGE [1] - 1:24 judgment [1] - 15:15 June [1] - 1:21</p> <p>K</p> <p>keep [1] - 17:7 Kennedy [1] - 3:15 Kerri [1] - 3:12 KERRI [1] - 2:6 Kerri-Ann [1] - 3:12 KERRI-ANN [1] - 2:6</p> |
|---|---|--|--|

| | | | | | | |
|---|--|--|---|---|---|--|
| <p>17:24, 18:5, 18:6, 18:7, 18:11, 18:13, 18:14, 18:15, 18:16, 18:17, 18:22, 19:13, 19:18, 19:20</p> <p>marketing [1] - 13:11</p> <p>MARTENS [1] - 2:14</p> <p>Martens [1] - 3:20</p> <p>MASIMO [4] - 1:6, 1:8, 1:14, 1:16</p> <p>Masimo [61] - 3:17, 4:8, 4:10, 4:12, 4:16, 4:18, 4:21, 5:2, 5:7, 5:13, 6:18, 6:24, 6:25, 7:3, 7:6, 7:8, 7:19, 7:21, 7:23, 9:17, 10:1, 10:8, 10:13, 11:16, 11:17, 11:18, 12:19, 13:2, 14:4, 14:8, 14:14, 14:17, 15:1, 15:4, 16:2, 16:9, 16:12, 16:13, 16:16, 16:17, 16:23, 17:13, 17:17, 17:20, 17:24, 18:2, 18:5, 18:20, 18:24, 19:6, 19:11, 19:12, 19:18, 20:3, 20:8, 20:15, 20:19, 20:21, 21:9, 21:17</p> <p>Masimo's [31] - 5:4, 5:6, 5:16, 5:18, 5:20, 8:1, 9:10, 9:11, 9:13, 10:16, 10:18, 11:6, 11:10, 11:19, 12:8, 13:6, 13:13, 15:6, 15:21, 17:14, 18:7, 18:19, 19:4, 19:7, 19:14, 19:16, 19:22, 19:23, 20:5, 20:11, 21:7</p> <p>material [7] - 10:9, 10:15, 11:3, 13:1, 14:21, 15:3</p> <p>materiality [1] - 14:5</p> <p>MCLAUGHLIN [1] - 2:12</p> <p>mean [2] - 4:5, 12:15</p> <p>measure [1] - 17:16</p> <p>measurement [2] - 18:18, 20:24</p> <p>measuring [1] - 21:18</p> <p>meet [1] - 14:3</p> <p>meets [1] - 18:22</p> <p>Megan [1] - 3:14</p> <p>mentioned [2] - 18:25, 20:7</p> <p>merits [1] - 21:12</p> <p>Michele [2] - 1:25, 22:13</p> | <p>might [1] - 21:12</p> <p>Milici [1] - 3:13</p> <p>MILICI [1] - 2:9</p> <p>misleading [1] - 20:25</p> <p>misrepresentations [2] - 10:14, 11:4</p> <p>misrepresented [2] - 11:4, 11:8</p> <p>moment [1] - 4:3</p> <p>monitoring [1] - 7:19</p> <p>monopolist [1] - 16:18</p> <p>monopolization [2] - 15:21, 15:22</p> <p>monopoly [4] - 16:5, 18:4, 18:23, 19:17</p> <p>months [1] - 7:9</p> <p>Moore [1] - 3:11</p> <p>MOORE [2] - 2:3, 3:10</p> <p>moreover [1] - 10:24</p> <p>most [2] - 13:24, 21:17</p> <p>motion [9] - 6:3, 8:5, 8:8, 9:1, 12:20, 14:7, 17:23, 20:5, 20:13</p> <p>motions [7] - 3:7, 3:24, 4:1, 6:13, 9:9, 21:24, 22:6</p> <p>moved [6] - 4:25, 5:4, 5:11, 5:18, 7:13, 9:10</p> <p>moves [1] - 6:14</p> <p>moving [2] - 9:9, 15:18</p> <p>MR [2] - 3:10, 3:18</p> <p>must [1] - 10:25</p> <p>Myers [7] - 10:3, 11:11, 11:13, 12:3, 12:9, 14:20, 14:22</p> | <p>Nos [1] - 5:9</p> <p>NOTE [1] - 3:3</p> <p>notes [1] - 22:11</p> <p>number [2] - 4:18, 13:3</p> | <p>9:22, 10:7, 10:9, 10:10, 10:11, 10:15, 11:13, 11:25, 12:5, 12:23, 14:7, 14:12, 14:19, 19:10, 19:11, 19:13, 21:10, 21:16</p> <p>O</p> <p>object [1] - 22:2</p> <p>objections [1] - 22:5</p> <p>obtained [3] - 16:4, 16:14, 19:10</p> <p>obtaining [2] - 9:16, 18:4</p> <p>occur [1] - 16:20</p> <p>OF [1] - 1:2</p> <p>offered [2] - 6:18, 7:11</p> <p>OLSON [1] - 2:14</p> <p>one [6] - 9:13, 9:19, 11:2, 16:3, 18:8, 18:12</p> <p>opposed [1] - 6:18</p> <p>order [1] - 22:3</p> <p>ornamental [2] - 11:24, 12:25</p> <p>outset [1] - 5:24</p> <p>overseas [1] - 18:12</p> <p>owed [1] - 12:9</p> | <p>P</p> <p>P.A [1] - 2:12</p> <p>p.m [2] - 3:4, 22:9</p> <p>paragraph [1] - 7:6</p> <p>parameter [1] - 20:23</p> <p>parameters [1] - 17:17</p> <p>part [1] - 16:3</p> <p>particular [7] - 4:4, 6:23, 9:14, 10:1, 13:14, 21:20, 22:6</p> <p>particularity [1] - 10:21</p> <p>parties [8] - 4:13, 4:15, 5:22, 21:13, 21:14, 21:20, 22:4</p> <p>parties' [1] - 21:15</p> <p>party [2] - 4:5, 22:2</p> <p>past [2] - 12:20, 15:15</p> <p>patent [10] - 11:15, 13:14, 13:15, 14:8, 14:10, 14:11, 16:4, 16:14, 20:1, 21:20</p> <p>patentability [2] - 10:15, 14:22</p> <p>patented [1] - 13:11</p> <p>patents [35] - 4:10, 4:22, 5:8, 5:16, 7:17, 7:19, 7:23, 8:4, 8:11, 8:16, 8:18, 8:23, 9:5, 9:16, 9:19, 9:20,</p> | <p>pre [1] - 21:9</p> <p>pre-suit [1] - 21:9</p> <p>predatory [2] - 16:7, 20:1</p> <p>preference [1] - 6:10</p> <p>preparation [1] - 12:12</p> <p>pending [4] - 3:7, 3:24, 3:25, 21:24</p> <p>percent [4] - 18:7, 18:10, 18:11, 18:22</p> <p>performance [1] - 16:21</p> <p>patents' [1] - 12:22</p> <p>permitted [2] - 14:9, 21:5</p> <p>person [1] - 12:11</p> <p>persons [1] - 12:23</p> <p>Pharms [1] - 17:8</p> <p>phase [1] - 15:17</p> <p>Phillips [1] - 3:19</p> <p>PHILLIPS [3] - 2:12, 2:12, 3:18</p> <p>physiological [4] - 17:17, 18:18, 20:23, 21:18</p> <p>PICKERING [1] - 2:8</p> <p>Plaintiff [3] - 1:4, 1:12, 2:10</p> <p>plaintiff [1] - 17:1</p> <p>plaintiffs [1] - 4:7</p> <p>plausible [4] - 8:15, 8:18, 13:20, 18:21</p> <p>plausibly [11] - 6:17, 7:10, 7:16, 7:18, 7:25, 8:22, 9:6, 15:2, 17:14, 18:7</p> <p>plead [2] - 11:7, 13:23</p> <p>pleaded [2] - 14:1, 20:15</p> <p>pleading [7] - 6:5, 10:25, 11:19, 12:8, 13:22, 17:14, 18:7</p> <p>pleadings [3] - 5:24, 10:22, 21:14</p> <p>pleads [1] - 8:14</p> <p>Poe [1] - 3:15</p> <p>points [3] - 13:2, 14:8, 19:9</p> <p>popular [1] - 18:12</p> <p>portfolio [1] - 7:3</p> <p>position [2] - 13:1, 13:10</p> <p>potentially [1] - 20:16</p> <p>Potter [1] - 3:11</p> <p>POTTER [1] - 2:3</p> <p>Powell [1] - 3:20</p> <p>POWELL [1] - 2:15</p> <p>power [4] - 13:4, 18:4, 18:23, 19:17</p> <p>practitioner [1] - 13:4</p> | <p>Q</p> <p>qualifies [1] - 16:3</p> <p>questions [2] - 19:20, 20:2</p> |
|---|--|--|---|---|---|--|

| | | | |
|---|---|--|---|
| <p style="text-align: center;">R</p> <p>raise [5] - 6:21, 8:15, 15:7, 18:21, 20:17 raising [1] - 20:19 rather [1] - 5:23 rationale [1] - 8:8 read [1] - 6:2 ready [1] - 3:23 real [1] - 20:1 reasonable [6] - 6:21, 13:24, 14:1, 15:8, 20:17, 20:19 reasonably [1] - 11:1 reasons [5] - 4:2, 8:13, 8:21, 15:10, 17:10 recitation [1] - 6:6 recite [1] - 5:25 recommend [6] - 3:25, 15:10, 17:25, 20:5, 20:13, 21:4 recommendation [7] - 3:24, 4:3, 6:7, 8:7, 15:24, 21:22, 21:25 record [1] - 6:2 refer [1] - 21:25 reference [1] - 16:1 references [3] - 14:21, 15:6, 15:8 refers [1] - 8:10 regarding [2] - 4:12, 8:12 reject [1] - 19:7 rejected [1] - 17:10 rejection [1] - 14:11 relate [1] - 21:17 related [1] - 12:16 relates [1] - 12:15 relating [4] - 4:10, 7:19, 8:4, 8:11 released [1] - 7:8 relevant [5] - 12:10, 17:2, 17:14, 17:21, 17:24 report [5] - 3:23, 6:7, 15:24, 21:22, 21:25 REPORTER'S [1] - 3:3 representations [3] - 13:12, 20:16, 20:18 request [3] - 4:13, 15:10, 17:25 required [1] - 13:22 requires [1] - 10:22 resolve [1] - 5:25 resources [1] - 22:5 respect [4] - 11:9, 14:5, 16:24, 20:23 respective [2] - 9:15,</p> | <p>9:25 responds [1] - 6:20 result [2] - 20:20, 20:24 rise [1] - 14:1 rising [1] - 21:3 role [1] - 13:10 Rolfe [2] - 1:25, 22:13 Rule [1] - 10:20 rule [1] - 10:21 Ruling [1] - 1:21 run [1] - 22:3 Ryan [1] - 3:19 RYAN [1] - 2:16 Ryobi [1] - 6:8</p> <p style="text-align: center;">S</p> <p>sales [1] - 18:9 Samsung [1] - 18:12 satisfy [2] - 10:17, 10:20 saw [1] - 4:13 scheme [1] - 10:4 second [1] - 19:16 secret [1] - 4:16 secretarial [1] - 12:18 Section [2] - 15:22, 20:6 see [1] - 21:16 seeking [1] - 16:13 seeks [3] - 15:20, 20:8, 20:11 selected [2] - 12:4, 13:15 selection [1] - 12:21 sell [3] - 6:18, 7:11, 16:21 selling [1] - 16:13 sells [1] - 4:7 sensor [3] - 9:22, 11:13, 11:14 sensors [1] - 9:18 separate [2] - 10:6, 19:19 set [5] - 6:6, 9:13, 15:22, 16:19, 16:20 several [1] - 20:15 shape [1] - 9:17 Shape [1] - 15:24 share [8] - 18:6, 18:9, 18:10, 18:13, 18:14, 18:15, 18:16, 18:22 Sherman [3] - 15:22, 20:5, 21:4 side [1] - 21:21 single [1] - 13:23 smart [6] - 18:9, 18:11, 18:13, 18:14,</p> | <p>18:16, 18:17 so-called [1] - 20:1 sold [2] - 6:18, 7:11 sort [1] - 15:18 Sound [26] - 4:21, 4:24, 5:8, 5:10, 6:12, 6:14, 6:16, 6:17, 6:21, 7:1, 7:4, 7:11, 7:13, 7:16, 7:23, 8:1, 8:2, 8:3, 8:5, 8:8, 8:13, 8:15, 8:17, 8:22, 9:1, 9:3 SOUND [2] - 1:6, 1:14 speaking [1] - 5:22 specific [10] - 10:22, 11:2, 11:5, 11:7, 11:19, 11:20, 13:23, 15:3, 15:9 specifically [1] - 6:16 specification [1] - 14:9 specifications [1] - 14:11 spent [1] - 22:5 squarely [1] - 17:10 stage [6] - 13:22, 14:24, 18:23, 19:15, 21:1, 21:13 standard [5] - 6:3, 6:4, 10:21, 14:3, 16:21 standards [3] - 6:7, 6:11, 15:23 standing [1] - 16:10 start [1] - 6:12 started [1] - 3:7 state [8] - 4:25, 5:5, 5:12, 6:4, 6:15, 7:14, 21:2, 21:5 statements [1] - 20:15 STATES [2] - 1:1, 1:24 states [2] - 19:6, 20:4 stenographic [1] - 22:11 STEPHEN [1] - 2:15 Steve [1] - 3:19 store [1] - 19:23 stricken [2] - 10:17, 10:20 strike [7] - 3:8, 3:24, 5:5, 5:20, 9:11, 10:18, 15:11 subsequently [1] - 7:8 substantially [2] - 9:21, 12:11 substantive [2] - 13:6, 13:8 substantively [2] - 12:15, 14:23 substitutes [1] - 20:22 succeed [1] - 16:17</p> | <p>sufficient [8] - 7:15, 8:14, 10:25, 14:3, 14:7, 15:7, 18:23, 19:4 sufficiently [1] - 12:9 suggest [3] - 7:10, 7:16, 13:13 suggesting [2] - 6:17, 15:14 suit [2] - 21:9, 21:21 summarize [1] - 4:2 summary [1] - 15:15 support [1] - 9:17 supporting [1] - 14:10 survive [1] - 14:7</p> <p style="text-align: center;">T</p> <p>team [1] - 3:13 Technologies [1] - 6:8 Technology [1] - 15:25 teleconference [1] - 3:3 Telephonic [1] - 1:21 THE [5] - 1:1, 1:2, 3:5, 3:16, 3:21 theories [1] - 20:2 theory [7] - 19:3, 19:16, 19:21, 19:23, 19:25, 20:4, 20:9 thereto [1] - 12:16 third [1] - 19:23 Thomas [1] - 3:15 three [2] - 16:7, 18:11 today [1] - 22:3 together [1] - 18:21 trade [1] - 4:15 Trade [1] - 4:17 transcript [1] - 22:11 TransWeb [3] - 16:23, 17:3, 17:10 treats [1] - 21:2 trial [2] - 15:17, 15:19 tried [2] - 15:17, 15:19 Trios [1] - 15:24 true [7] - 7:10, 11:10, 13:6, 13:13, 16:20, 20:17, 22:10 Tuesday [1] - 1:21 turning [1] - 8:7 two [4] - 11:4, 16:5, 18:10, 20:2 types [1] - 19:1</p> <p style="text-align: center;">V</p> <p>variety [1] - 13:9 various [1] - 5:14 viability [1] - 19:20 viable [1] - 20:9 voluminous [1] - 5:24</p> <p style="text-align: center;">W</p> <p>W1 [11] - 4:9, 6:19, 7:8, 7:11, 7:22, 7:24, 8:2, 8:23, 16:13, 20:21, 21:1 Walker [7] - 16:4, 16:14, 16:24, 19:2, 19:3, 19:8, 20:4 watch [32] - 4:8, 4:9, 4:13, 6:19, 6:25, 7:8, 7:12, 7:20, 7:21, 7:25, 8:2, 8:3, 8:23, 16:6, 16:13, 16:17, 16:21, 17:15, 18:5, 18:7, 18:9, 18:11, 18:13, 18:14, 18:15, 18:16, 18:17, 19:19, 19:22, 20:21, 20:22, 21:1 watches [2] - 4:7, 18:17</p> |
| | | | |

wearable [1] - 8:11
week [1] - 3:7
wherein [1] - 15:5
whole [1] - 19:19
wholly [1] - 12:17
willful [3] - 7:13, 9:6,
21:7
willfully [1] - 9:5
willfulness [1] - 8:20
Wilmer [1] - 3:13
WILMER [1] - 2:8
Wilmington [1] - 1:20
withheld [6] - 10:8,
11:2, 11:4, 11:8,
14:12, 15:9
WL [3] - 6:8, 15:25,
17:9
worn [2] - 17:16,
21:17
wristwatches [1] -
17:16